

(i) Licensees subject to this subsection must not enter into agreements (e.g. option agreements or management contracts) to assign or transfer control of authorizations before or during the first three years of operation.

(ii) This subsection does not apply to applications filed for (a) a cellular system to be transferred as part of a bona fide sale of an on-going business to which the cellular operation is incidental; (b) the transfer of control of a cellular system required because of the death of the licensee; or, (c) the *pro forma* transfer of control of a cellular licensee which does not involve a change of ownership.

### Discussion:

The proposed new subsection (d) is intended to incorporate the restrictions on alienation of authorizations awarded in a comparative renewal proceedings which were adopted in the cellular renewal proceeding, *Cellular Renewal, First R&O*, 7 FCC Rcd. 719 (1992), as *codified at* 47 C.F.R. § 22.40(b)(2), (i)-(iii). Although it appears the Commission intended to incorporate current § 22.40(b) into proposed § 22.139 "Trafficking" (see *Part 22 Rewrite, NPRM*, 7 FCC Rcd. at 3752 (Appendix C)), the section was inadvertently omitted. NewVector suggests that it should be incorporated in proposed § 22.943 for clarity and to consolidate the rules governing transfers and assignments in the Cellular Radiotelephone Service.

Further, NewVector recommends that the language proposed in (d)(i) be incorporated to clarify that the restriction on alienation includes agreements (e.g. option agreements or management contracts) to assign or transfer control of authorizations before or during a three year holding period. This change is consistent with the same clarification in §§ 22.943(a)(1) and 22.137.

## **§ 22.946(a) Construction period for cellular systems.**

### NPRM:

(a) Commencement of service. New cellular systems must be at least partially constructed and begin providing cellular service to the public by the end of the construction periods specified in Table H-1. All construction periods begin on the date of grant of the initial authorization.

### Recommendation:

Subsection (a) should be amended to read:

(a) Commencement of service. The first system authorized on each channel block and any subsequent systems authorized pursuant to contracts to partitioned markets must be at least partially constructed and begin providing service to the general public by the end of the construction periods specified in Table H-1. Unserved area systems must be fully constructed (all proposed cells) and

providing service to the public by the end of the construction period specified in Table H-1.

Discussion:

The proposed change in subsection (a) above is intended to distinguish the construction and commencement of service requirement as between unserved area licensees and other licensees in the cellular service. The revised subsection is consistent with the Commission's decisions in the unserved area proceeding to require unserved area licensees "to complete construction of their systems and initiate service to the public within one year of the date of their initial authorizations." *Unserved Areas, First R&O*, 56 Fed. Reg. 58503, 58504 (November 20, 1991). The Commission imposed the more stringent requirement on unserved area licensees in order to "guarantee expeditions service to the public and deter speculative applications." *Id.* Further, the proposed change clarifies a possible discrepancy between proposed § 22.946(a) and § 22.946(b)(2). As discussed below, with the proposed revision to subsection (a), subsection (b) should be eliminated in its entirety.

**§ 22.946(b)(1) and (b)(2)**

NPRM:

[Proposed § 22.946(b)(1) retains the former 75% coverage requirement. Proposed § 22.946(b)(2) requires unserved area cellular licensees to complete construction of their systems during the one-year construction period.]

Recommendation:

Proposed § 22.946(b) should be deleted in its entirety and proposed subsection (c) renumbered to (b).

Discussion:

The revisions recommended to proposed § 22.946(a) make subsection (b)(2) redundant and no longer necessary. Proposed § 22.946(b)(1) retains the 75% coverage requirement which was effectively eliminated in the *Unserved Area, Second R&O*, 7 FCC Rcd. 2449 (1992), when the Commission adopted the new 32 dBu formula for calculating carriers' CGSA and cellular reliable service area. Thus subsection (b) is not necessary.

**§ 22.946(c)**

NPRM:

(c) Construction period for major modifications. Major modifications must be constructed within one year from the date the application for modification is granted. In the case of unserved area cellular systems, this does not extend the period, specified in paragraph (b)(2) of this section, for constructing the original proposal. Failure to comply with this requirement results in the termination

of the authorization for the major modification, pursuant to § 22.144(b).

Recommendation:

Subsection (c) should be amended to read:

(c) Construction period for major modifications. Major modifications must be constructed within one year from the grant date of the application for modification, except that modifications proposed for the first system authorized on each channel block and any subsequent systems authorized pursuant to contracts to partition markets will be assigned the remaining construction period of the initial authorization if more than one year remains in the initial authorization. In the case of unserved area cellular systems, this does not extend the period, specified in paragraph (b)(2) of this section, for constructing the original proposal. Failure to comply with this requirement results in the termination of the authorization for the major modification, pursuant to § 22.144(b).

Discussion.

Subsection (c) should be rewritten to incorporate the Commission's existing rule 22.43(c)(3) that a major modification authorization will be granted for one year or longer if the licensee's initial authorization has more than one year remaining. The change is proposed in order to avoid litigation over impairment of an existing licensee's rights. In the event subsection (b) is deleted as recommended above, then the rewritten subsection (c) would become the new (b).

**§ 22.947****Five Year fill-in period****§ 22.947(a)**NPRM:

(a) Exclusive right to expand within market. Except as provided in paragraph (b) of this section, the Commission does not accept applications for authority to operate a new cellular system in any unserved area on the channel block in that market during the five year fill-in period for each such cellular system.

Recommendation

Amend to read:

(a) Exclusive right to expand within market. Except as provided in paragraph (b) of this section, the Commission does not accept applications for authority to operate a new cellular system in any area where the licensee's CGSA does not extend in that market during the five year fill-in period for each such cellular system.

Discussion:

Subsection (a) has been rewritten by deleting reference to unserved areas and adding "area where the licensee's CGSA does not extend." This suggested change is consistent with the proposed definition (proposed § 22.99) for unserved areas -- unserved areas do not exist prior to the expiration of the five-year fill-in period. Because licensees of the first cellular system on each channel block have a protected five-year period to expand their systems, or enter into contracts to partition their markets, unserved areas cannot be determined until after expiration of the protected period. Thus, the term "unserved area" should only be used in the context of an expired market.

**§ 22.947(b)(1)**NPRM:

(b) Partitioned RSAs. [Proposed § 22.947(b)(1) permits RSA licensees during the five-year fill-in period to enter into contracts to partition their markets.]

Recommendation:

Subsection (b)(1) should be amended as follows:

(b) Partitioned Markets. During the five year fill-in period, the licensee of the first cellular system on each channel block in a market may assign or transfer a portion of its market to another entity in furtherance of a market settlement or enter into contracts with eligible parties that allow such parties to apply for a new cellular

system on that channel block within the market. The Commission may grant such applications if they are in compliance with the rules in this part. Markets with two or more authorized cellular systems on the same channel block during the five year fill-in period are referred to as partitioned markets. Each licensee of a partitioned market will continue have protected CGSA after the expiration of the five-year fill-in period provided that the partitioned market licensee files a system information update in accordance with subsection (c) of this section.

Discussion:

NewVector's recommendation acknowledges that partitioned markets also result from the initial wireline lottery settlements pursuant to the Commission's decision in the rural cellular service proceeding, *Amendment of the Commission's Rules for Rural Cellular Service*, Third Report & Order, 4 FCC Rcd. 2440, n.21 (1988). Moreover, the last sentence should be added to clarify that licensees' CGSAs in partitioned markets are protected after the expiration of the fill-in period, provided that they file system update information.

**§ 22.947(c)**

NPRM:

(c) System information update. [Subsection (c) sets forth the procedures and requirements for existing licensees to file their system information updates to protect their service areas.]

Recommendation:

(c) System information update. Sixty days before the end of the five-year fill-in period, the licensee or licensees of partitioned markets in each cellular system authorized on each channel block in each cellular market must file, in triplicate, a full scale map, a reduced map, and an updated channel usage chart. \* \* \* \* \*

Discussion:

Consistent with the discussion above (proposed subsection (b)), subsection (c) should be revised to allow licensees of partitioned markets to protect their CGSA areas at the end of the five-year fill-in period for the channel block in the partitioned market.

**§ 22.949(a)-(b)      Unserved area licensing phases, procedures and filing windows.**

NPRM:

[Proposed § 22.949 defines the licensing procedures and filing deadlines for unserved areas.]

**Recommendation:**

Amend subsection (a)(1) by adding the following immediately after the last sentence:

The filing window for applications for unserved area systems in markets where the fill-in period has already expired will be announced by public notice.

Amend subsection (b)(2) to insert the following sentence at the beginning:

Applications for Phase II will be considered mutually exclusive if they propose CGSA overlaps with another Phase II application filed on the same day.

**Discussion:**

Subsection (a)(1) should be modified consistent with current § 22.6(b)(2)(ii) (*see Unserved Area, First R&O*, 6 FCC Rcd. at 6194, to clarify that the filing window for expired markets will be designated by public notice).

Subsection (b)(2) should be clarified by including a definition of mutually exclusive applications for Phase II unserved area applications.

**§ 22.951****Minimum coverage requirement.****NPRM:**

Applications for authority to operate a new cellular system in an unserved area, other than those filed by the licensee of an existing system that abuts the unserved area, must propose a contiguous cellular geographical service area (CGSA) of at least 130 square Kilometers (50 square miles).

**Recommendation:**

Proposed § 22.951 should be amended by adding the following immediately after the last sentence of the paragraph.

*De minimis* extension areas may not be counted as territory for purposes of the minimum area coverage requirement.

**Discussion:**

The suggested change is consistent with current § 22.903(d)(3)(ii) adopted in the unserved area proceeding. *See* 47 C.F.R. § 22.903(d)(3)(ii).

## § 22.953(a)-(e)      **Content and form of applications.**

### NPRM:

[The section sets forth the requirements for filing applications for initial cellular systems.]

### Recommendation:

Amend to read:

## § 22.953                      **Content and form of applications.**

Applications for authority to construct and operate a new cellular system in an unserved area must comply with subsection (a)-(d) of this section. Applications for new stations or notifications of modified facilities expanding the CGSA of existing cellular systems must comply with the requirements of subsection (f) of this section.

(a) Unserved areas. Application to construct and operate a new cellular system in an unserved area must comply with the specifications in this section.

\* \* \*

(5) Exhibits. The following exhibits must be set off by tabs and numbered as follows:

(i) EXHIBIT I - full-size map. \* \* \* [Add the following immediately after the last sentence.] The map must include an effective date (the date when the CGSA and cell site depictions were drawn on the map). Maps must be submitted for each market into which the CGSA extends, even if *de minimis*, showing the extension area in the adjacent market, marked and labelled for the adjacent market.

\* \* \*

(v) EXHIBIT V - ownership information. \* \* \* [Add the following immediately after the last sentence.] In the case of partnerships, the name and address of each partner, his citizenship and the share or interest participation in the partnership. This information must be provided for all partners, regardless of their respective ownership interests in the partnership.

\* \* \*

(ix) EXHIBIT IX - Start-up expenses. \* \* \* [Add the following immediately after the last sentence.] Any licensee applying for an unserved area adjacent to its existing cellular system, to integrate such area into the existing system, is exempt from the financial demonstration requirements. See § 22.937(g).

\* \* \*

(b) In Phase I, applicants will file a master microfiche and one copy in accordance with § 22.105. The microfiche must depict the reduced 8.5" x 11" map. The paper original of the application must be filed 7 days after the release of the public notice announcing the applicant as the lottery winner and include a full size map.

(c) In Phase II, applicants must file the paper original and a master microfiche plus two microfiche copies. The map on a scale of 1:250,000 and the reduced map must be included with the paper original.

(d) A copy of each unserved area application must be served on the licensees for the same frequency block of any adjacent systems whose CGSA, MSA or RSA boundaries are within 50 miles of the boundaries of the proposed system.

(e) Applications for new facilities or notifications of modified facilities expanding the CGSA of existing systems must include the following:

(1) an exhibit including at least one 1:250,000 map and one 8½ x 11 reduced copy of that map drawn in accordance with § 22.953(a)(5)(i) and (5)(ii) of this section. In addition, the map or maps must show the system's existing Cellular Geographic Service Area (CGSA), if any, and the CGSA proposed in the application. The CGSA shall be calculated in accordance with § 22.911.

#### Discussion:

The recommended modifications to the introductory paragraph and proposed § 22.953(e) are intended to clarify that existing carriers must attach as an exhibit an 1:250,000 map and an 8½ x 11 reduction their applications (FCC Form 401 and FCC Form 489) filed with the Commission. This is consistent with the current rules §§ 22.913(1), 22.923(1), and 22.926. Current §§ 22.913 and 22.923 have been removed and § 22.926 has been incorporated in proposed 22.953(a)(5)(i) applicable to unserved area applicants. *See Part 22 Rewrite, NPRM, 7 FCC Rcd. at 3754 (Appendix C).*

NewVector proposes modifications to subsection (a)(5)(i), regarding the maps to be filed to include an "effective date" and require that copies be filed in every market in which the CGSA of an applicant will extend. *See proposed § 22.911(c) regarding contract extensions.* The proposed modification is consistent with current § 22.926 and should be retained.

Subsection (a)(v) should be modified to clarify that partnerships, along with corporations and individuals, are required to report ownership information. The showing is contained in current § 22.13(a)(1)(iv) of the rules. Current § 22.13 was revised and renumbered to § 22.108. The subsection containing the partnership information was deleted. Subsection (a)(v) incorporates proposed § 22.108 and adds an additional



disclosure regarding individuals. Similarly, the rule should be expanded to include partnership information.

Subsection (a)(ix) should be clarified to exclude existing licensees from including a financial exhibit when proposing to service unserved area as part of their existing systems. This change is consistent with the Commission's decision in the unserved area proceeding and current § 22.917(f)(8). The Commission excluded existing carriers from making the financial showing because "[a]djacent system licensees will usually be incurring only marginal additional capital costs to add additional cells to an existing system" and the same concerns regarding speculation in filing unserved area applications are not present. *Unserved Area, First R&O*, 6 FCC Rcd. at 6211 (¶ 60).

Subsections (b)-(d) are proposed to clarify the filing procedures for unserved area applicants. The procedures were adopted in the unserved area proceeding and are codified at 47 C.F.R. § 22.6(d)(3). The subsections, as proposed, have been revised slightly to conform to this *NPRM*. It appears that they were inadvertently omitted in the *NPRM*. See *Part 22 Rewrite, NPRM*, 7 FCC Rcd. at 3752 (Appendix C).

## **APPENDIX 2**

## **Application Forms and Instructions**

NewVector supports the Commission's intent to revise FCC Forms 401, 489, and 490. While the proposed forms streamline the information required, NewVector suggests that additional revisions be made to further simplify the application process. These suggestions incorporate NewVector's comments on the proposed rules.

### **A. FCC Form 401**

#### **1. Instructions**

Corrections should be made to the FCC Form 401 instructions to cross-reference revised rule numbers instead of existing rule numbers. Instruction items 15-19 should be corrected to reference the correct item numbers on FCC Form 401.

#### **2. Schedule A, Item 12 — Type of application**

NewVector proposes that a new code be added to the section relating to cellular radiotelephone to read: "A de minimis extension outside the cellular market area be authorized." Consistent with NewVector's comments to § 22.912(a) which would allow existing licensees to propose de minimis service area boundary extensions for technical reasons, the FCC Form 401 should include the option of filing an application which proposes a de minimis extension.

Item J should be revised to read:

"A new CGSA be authorized to an initial unserved area applicant." The revision would clarify that the option only applies to unserved area applicants (since most CGSA expansions are now permissive), and acknowledges that an existing licensee may propose to expand the CGSA of an existing system in its unserved area application.

#### **3. Schedule A, Item 17 — Title of signer**

This item should conform to the signature blocks in FCC Forms 489 and 490, which provide for the use of letter codes to designate the capacity of the signing party, rather than a typed title. NewVector suggests that the block indicating the capacity of the signer for all three forms be amended to read as follows:

|   |                                  |
|---|----------------------------------|
| ##.   | Signed in the capacity of: _____ |
| <u>I</u> ndividual applicant                  | <u>M</u> ember of partnership    |
| <u>O</u> fficer of corporation or association |                                  |
| <u>A</u> uthorized employee of corporation    |                                  |

This would make specific provision for signing by an authorized employee of a corporation, as is permitted by § 1.743(a) of the Rules; the coded blocks on the *NPRM*'s proposed FCC Forms 489 and 490 do not provide for signing by an authorized employee. The Commission should also consider adding an explanation to the Instructions for each form to indicate that when the members of an applicant partnership are in turn corporations or partnerships, "Member of partnership" should be indicated and the signer should be an individual authorized to act on behalf of a member of the partnership.

#### **4. Schedule B**

NewVector applauds the Commission's compression of the FCC Form 401, Schedule B. The proposed Schedule B eliminates information which was previously required but seldom used. NewVector suggests, however, that some minor revisions may be necessary to avoid confusion. The Commission should make clear that the header immediately preceding Items 18, 27, 34, 36, and 37 is for Commission use only. While an applicant may be able to provide the call sign and type of action requested, it should not provide a file number as, in most cases, the Form 401 will be assigned a new file number. Similarly, an applicant should not provide the date filed. The date filed is better determined by the Commission (*i.e.*, FCC Date Stamp) rather than by the applicant. NewVector also suggests that No. 20 be modified to read: "if changing or correcting antenna location ..." The change would simplify the procedure for correcting the Commission's records. No. 21, option ONE should be modified to read: "On building, not exceeding 20 feet or not exceeding 20 feet AGL" in accordance with § 17.14(b), which says that any antenna structure less than 20 feet is exempt from FAA filing requirements.

### **B. FCC Form 489**

#### **1. Instructions**

As with the proposed FCC Form 401 instructions, corrections should be made to the FCC Form 489 instructions to cross-reference the revised rules instead of the current rules.

#### **2. Item 6, code E — Uncompleted partial assignment**

Consistent with the *NPRM*, Item 6, code E should be corrected to read "Partial assignment was not completed within 60 days." See proposed § 22.137(b). In addition, the word "license" should be corrected to read, "licensee."

#### **3. Item 6, new code C — Minor modifications**

Consistent with the discussion in the body of NewVector's Comments on notification filings for minor modifications, and the corresponding rule revision modifications for §§ 22.163 and 22.165 in Appendix 2, a new code C should be added to item 6, with the

description, "Minor modifications have been made pursuant to § 22.163."<sup>1</sup> The addition of this category is consistent with NewVector's position that licensees should be required to notify the Commission of minor modifications/relocations and additional transmitters by filing FCC Form 489. Such facilities would receive interference protection.

**4. Item 11 — Capacity of signer:** See comment 3 to Form 401, above.

**C. FCC Form 490**

**1. Instructions**

As with the proposed instructions for the other forms, corrections should be made to the FCC Form 490 instructions to cross-reference the revised rules instead of current rules.

Consistent with the discussion in the body of NewVector's Comments, the Commission should no longer require that an FCC Form 430 for the assignee or transferee be attached to (or referenced in) all FCC Form 490 filings. Accordingly, NewVector recommends that all references to the FCC Form 430 be removed from the instructions. The instructions should, however, reference the requirements in the rules that require disclosure of all real parties in interest and the applicant's qualifications to hold a license.

**2. Item 4 — Transfer of control or assignment of authorization**

NewVector suggests that item 4 be removed from the FCC Form 490. As discussed in the body of NewVector's Comments, there are no significant differences between assignments and transfers of control. There does not, therefore, appear to be any reason for requiring the identification of a given transaction as being either an assignment or a transfer.

**3. Item 5 — *Pro forma* assignment**

This Item should be amended to read, "Is this a *pro forma* application,?" because both assignment and transfer applications may be *pro forma*.

**4. Item 8 — Means of accomplishing assignment or transfer**

NewVector suggests that Item 8 be deleted in its entirety. Part (a) of this Item provides for the designation of the means of accomplishing the assignment or transfer as

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<sup>1</sup> Should the Commission not combine §§ 22.163 and 22.165, the new category should read "C Minor modifications have been made pursuant to §§ 22.163, 22.165."

either a sale/stock transaction or other. In the event of a sale/stock transaction, part (b) provides spaces for certain information about the stock.

This item appears to be unnecessary. It is unclear whether the response is used in processing, or whether it should be in any event. Most assignments and transfers involve a governing agreement as well as a mixture of various types of consideration, including, on some occasions, multiple classes and types of securities. In the case of stock transactions, the space in part (b) may be inadequate to describe the various types of stock involved. To the extent the Commission requires information about the nature of the transaction or the type of consideration involved, it would appear preferable to require that the transaction be described in an exhibit. This would accord with current practice.

## **5. Item 9 — Anti-drug certification by assignor or transferor**

This item should be amended to replace the term "applicant" with "assignor or transferor (applicant)" upon its first occurrence to remove ambiguity caused by the fact that there are two applicants involved in a Form 490 application.

## **6. Signature block for assignor or transferor**

The signature block should be moved to the bottom of page 1 of the form, which would separate Part 1 (which is completed by the assignor/transferor) from Part 2, which is completed by the assignee/transferee.

To be consistent with the signature blocks on revised FCC Forms 401 and 489, each section of the signature block should be numbered as a separate item.

The "Signature of Authorized Officer or Agent" block should be re-titled, "Signature," and the parenthetical instruction should be moved to the instruction sheet.

The mailing address of the assignor/transferor should be deleted, because the same information is provided in Item 1.

An item should be added to the signature block to designate the capacity in which the signing party has executed the application. See comment 3 to Form 401. Because an involuntary assignment or transfer will generally be signed by a person not acting in the same capacity as those listed in the box illustrated in comment 3 to Form 401, an additional code should be included in the signer's capacity block, such as "See attached document of authorization."

**7. Item 14 — Anti-drug certification by assignee or transferee**

The first occurrence of "applicant" should be replaced by "assignee or transferee (applicant)" for the reasons set forth in comment 5 above.

**8. Item 15 — Certification by assignee or transferee**

The first paragraph of the certification is phrased in terms only of an assignment of authorization, and does not include language appropriate for a transfer of control; it also presumes that the assignee or transferee is an individual, which is frequently not the case. NewVector suggest that this paragraph be rewritten to read:

The applicant waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests that written consent be granted to the assignment of authorization(s) or transfer of control of a licensee or permittee as herein described.

NewVector submits that the second paragraph of the certification should be deleted in its entirety. This paragraph retains language contained in Item 20 of the current FCC Form 490 concerning the assignee's or transferee's assumption of the assignor's or transferor's obligations and conditions and provides that the assignee or transferee will not be liable for certain matters involving the assignor or transferor prior to consummation.

This paragraph appears to be obsolete. It is unclear why this language has been included in this and one other FCC application form. Identical language is contained in the assignee's certification on FCC Form 702 (non-broadcast assignment of authorization), but there is no trace of this language in FCC Form 704 (non-broadcast transfer of control). The detailed forms for broadcast long-form assignments and transfers (FCC Forms 314 and 315) do not contain similar language, nor does the short-form broadcast assignment and transfer application form (FCC Form 316).

This paragraph does not appear to be required by any regulation or policy in the current or revised Part 22 or by any provision of the Communications Act. Furthermore, to the extent this language purports to affect an assignee's or transferee's liabilities regarding private parties, it would appear to be beyond the Commission's jurisdiction. The United States Supreme Court has held that the FCC does not have jurisdiction to modify or invalidate a contract or agreement. *Regents v. Carroll*, 338 U.S. 586 (1950). Furthermore, the Commission and its staff have consistently held that the Commission is not the proper forum for the resolution of contractual disputes among applicants or parties to a settlement agreement. See, e.g., *American Cellular Network Corporation of Nevada*, Order on Review, 2 FCC Rcd. 4530 (1987), *aff'd* 60 Rad. Reg. 2d (P&F) 1460 (Com. Car. Bur. 1986); *Columbia Cellular Partnership*, Memorandum Opinion and Order, 4 FCC Rcd. 6432 (Mob. Ser. Div.

1989); *Ellis Thompson*, Memorandum Opinion and Order, 4 FCC Rcd. 2599 (Com. Car. Bur. 1989), *affg* 3 FCC Rcd. 3962 (Mob. Ser. Div. 1988).

## **9. Signature Block for Assignee or Transferee**

To be consistent with the signature blocks on revised FCC Forms 401 and 489, each section of the signature block should be numbered as a separate item.

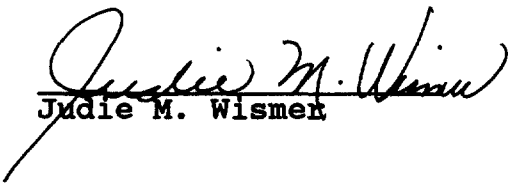
The block entitled "Designate Appropriate Classification" should be revised in accordance with comment 3 to Form 401.



CERTIFICATE OF SERVICE

I, Judie M. Wismer, a secretary in the law firm of Wilkinson, Barker, Knauer & Quinn, do hereby certify that I have on this 5th day of October, 1992 served by first class mail, postage prepaid a copy of the foregoing U S WEST NewVector Group, Inc. COMMENTS to the following:

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